

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE
TTAB

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Paper No. 9
EWH/KTP

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Baurch Zelikowics

Serial No. 74/590,765

Harold L. Novick of Larson and Taylor for Baurch Zelikowics.

Charles T.J. Weigell, Trademark Examining Attorney, Law
Office 109 (Deborah Cohn, Managing Attorney).

Before Rice, Seeherman and Hanak, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Baurch Zelikowics (applicant) seeks to register REPLEX
in typed capital letters for "shoes; shoe uppers; shoe
heels; shoe uppers removeably attachable to shoe heels; shoe
heels removeably attachable to shoe uppers; and parts
therefor." The intent-to-use application was filed on
October 26, 1994.

The Examining Attorney refused registration pursuant to Section 2(d) of the Lanham Trademark Act on the basis that applicant's mark, as applied to applicant's goods, is likely to cause confusion with the mark REPLEX previously registered in the form shown below for "woven fabrics used in the manufacturing of clothing." Registration No. 1,780,338.



When the refusal was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

In any likelihood of confusion analysis, two key considerations are the similarities of the goods and the similarities of the marks. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

In this case, the marks are virtually identical. Hence, the issue of likelihood of confusion turns primarily

upon the "differences in the essential characteristics of the goods."

The Examining Attorney contends that "there is an admitted ambiguity as to the scope of identification of goods recited in the cited registration." (Examining Attorney's brief page 5). Continuing, the Examining Attorney argues "that any ambiguity must be resolved in favor of the registrant and against the applicant." (Examining Attorney's brief page 5). The Examining Attorney then contends that the term "clothing" found in registrant's identification of goods is arguably broad enough to encompass shoes. (Examining Attorney's brief page 5). Thus, the Examining Attorney is of the belief that registrant's goods (woven fabrics used in the manufacturing of clothing) and applicant's goods (essentially shoes and parts therefor) are clearly related because "a broad reading of the term 'clothing' [in registrant's identification of goods] to encompass other 'covering' items for the body such as shoes is duly appropriate." (Examining Attorney's brief pages 7-8).

The reasoning of the Examining Attorney is defective in at least three respects. First, the registrant's identification of goods is simply not ambiguous. The phrase "woven fabrics used in the manufacturing of clothing" is easily understood.

Second, clothing and shoes are not the same, and there is no justification for reading the term "clothing" to

encompass shoes. While it is true that clothing and shoes are obviously related, by the same token "they are distinctly different." In re British Bulldog, Ltd., 224 USPQ 854, 856 (TTAB 1984). Indeed, the Trademark Manual of Examining Procedure, in explaining Class 25, makes separate mention of "clothing" on the one hand and "footwear" on the other hand. TMEP Section 1401.02(a).

Third, even assuming for the sake of argument that registrant's identification of goods is ambiguous (which it is not), the Examining Attorney's contention "that any ambiguity must be resolved in favor of the registrant and against the applicant" (Examining Attorney's brief page 5) is simply wrong. In re Trackmobile Inc., 15 USPQ2d 1152, 1154 (TTAB 1990); In re Protection Controls, Inc., 185 USPQ 692, 694 (TTAB 1975).

While the marks in question are virtually identical, we are confronted with a situation where applicant's goods are not one step removed from registrant's goods, but instead are at least two steps removed from registrant's goods. The relationship between applicant's goods and registrant's goods is as follows: shoes and parts therefor; clothing; woven fabrics used in the manufacturing of clothing. We find that the use of the virtually identical mark on shoes and parts therefor (on the one hand) and on woven fabrics used in the manufacturing of clothing (on the other hand) is not likely to result in confusion.

Decision: The refusal to register is reversed.

J. E. Rice

E. J. Seeherman

E. W. Hanak
Administrative Trademark
Judges, Trademark Trial
and Appeal Board